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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 JULIE A. BAKER,

Civil No. 07-712-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
14 Commissioner of Social Security,

15 Defendant.

16 _____
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1 AIKEN, Judge:

2 Claimant, Julie Baker, brings this action pursuant to the
3 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
4 1383(c)(3), to obtain judicial review of a final decision of the
5 Commissioner denying her application for disability insurance
6 benefits (DIB) under Title II of the Act and for Supplemental
7 Security Income (SSI) disability benefits under Title XVI of the
8 Act. For the reasons set forth below, the Commissioner's
9 decision is affirmed and this case is dismissed.

10 **PROCEDURAL BACKGROUND**

11 On September 6, 2002, plaintiff filed applications for both
12 DIB and SSI. Tr. 54-57, 457, 458-60. After the applications
13 were denied initially and on reconsideration, on February 15,
14 2005, plaintiff appeared and testified before an administrative
15 law judge (ALJ). Tr. 512-548. On March 21, 2005, the ALJ issued
16 a decision finding plaintiff not disabled within the meaning of
17 the Act. Tr. 15-23. On June 21, 2005, the Appeals Council
18 denied review, making the ALJ's decision the final agency
19 decision. Tr. 6-9. Plaintiff sought judicial review. Tr. 564.
20 This court reversed the ALJ's decision and remanded for further
21 proceedings. Tr. 564-77. Another hearing was held and on March
22 14, 2007, the ALJ again found plaintiff not disabled. Tr. 549.
23 Plaintiff files an appeal to this court.

24 **STATEMENT OF THE FACTS**

25 Plaintiff was born on October 5, 1959. Tr. 54. With some
26 time off between jobs, plaintiff worked from January 1979, to
27 October 2001, as a budget analyst and accountant. Tr. 93.
28 Plaintiff was 48-years-old at the time of the ALJ's second

1 decision, with a high school education and some college course
2 work. Tr. 54, 98. Plaintiff has past work experience as an
3 accountant, budget analyst, credit manager, and internal auditor.
4 Tr. 93, 128-35, 540-41. At her last job, plaintiff earned a
5 salary of \$42,000 per year plus bonuses. Tr. 93. Plaintiff
6 alleges disability since October 2001, due to migraine headaches,
7 medication side effects, hearing loss associated with status-post
8 ear surgery, depression, and other mental impairments.

9 STANDARD OF REVIEW

10 This court must affirm the Secretary's decision if it is
11 based on proper legal standards and the findings are supported by
12 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
13 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
14 mere scintilla. It means such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion."
16 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
17 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
18 The court must weigh "both the evidence that supports and
19 detracts from the Secretary's conclusions." Martinez v. Heckler,
20 807 F.2d 771, 772 (9th Cir. 1986).

21 The initial burden of proof rests upon the claimant to
22 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
23 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
24 an "inability to engage in any substantial gainful activity by
25 reason of any medically determinable physical or mental
26 impairment which can be expected . . . to last for a continuous
27 period of not less than 12 months. . . ." 42 U.S.C.
28 § 423(d)(1)(A).

1 The Secretary has established a five-step sequential
2 process for determining whether a person is disabled. Bowen v.
3 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
4 416.920. First the Secretary determines whether a claimant is
5 engaged in "substantial gainful activity." If so, the claimant
6 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
7 §§ 404.1520(b), 416.920(b).

8 In step two the Secretary determines whether the claimant
9 has a "medically severe impairment or combination of
10 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
11 §§ 404.1520(c), 416.920(c). If not, the claimant is not
12 disabled.

13 In step three the Secretary determines whether the
14 impairment meets or equals "one of a number of listed impairments
15 that the Secretary acknowledges are so severe as to preclude
16 substantial gainful activity." Id.; see 20 C.F.R.
17 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
18 presumed disabled; if not, the Secretary proceeds to step four.
19 Yuckert, 482 U.S. at 141.

20 In step four the Secretary determines whether the claimant
21 can still perform "past relevant work." 20 C.F.R.
22 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
23 disabled. If she cannot perform past relevant work, the burden
24 shifts to the Secretary. In step five, the Secretary must
25 establish that the claimant can perform other work. Yuckert, 482
26 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
27 (f). If the Secretary meets this burden and proves that the
28 claimant is able to perform other work which exists in the

1 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
2 416.966.

3 **DISCUSSION**

4 1. The ALJ's Findings

5 At step one, the ALJ determined that plaintiff had not
6 engaged in substantial gainful activity since her alleged
7 disability onset date. Tr. 556. At step two, the ALJ found that
8 plaintiff's headaches, depression, pain disorder and diabetes
9 were severe impairments. Id. At step three, the ALJ found that
10 plaintiff's impairments did not meet or equal the requirements of
11 a listed impairment. 20 C.F.R. Pt. 404, Subpt. P, App. 1. Tr.
12 555. Regarding plaintiff's residual functional capacity (RFC),
13 the ALJ found plaintiff could perform light work. Tr. 557; 20
14 C.F.R. §§ 404.1567, 416.967. Further, plaintiff was limited to
15 occasional use of scaffolds and ladders. Tr. 557. The ALJ also
16 found plaintiff capable of performing 1,2, and 3-step tasks, if
17 maintaining concentration for extended periods. Id. At step
18 four, the ALJ found plaintiff could not perform her past relevant
19 work. Tr. 561. Finally, at step five, the ALJ found plaintiff
20 was not disabled because she could perform other work existing in
21 significant numbers in the national economy; specifically as an
22 office helper or order caller, both classified as light,
23 unskilled employment. Tr. 562.

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1 2. Plaintiff's Allegations of Error¹

2 Plaintiff alleges that the ALJ failed to comply with this
3 court's remand order in that the ALJ failed to present a
4 hypothetical to the Vocational Expert (VE) which was based on an
5 accurate assessment of plaintiff's functional limitations. Tr.
6 573. The plaintiff also alleges error by the ALJ in failing to
7 consider the side effects of plaintiff's medications.

8 A. CONSIDERATION OF SIDE EFFECTS OF MEDICATION

9 The ALJ adequately addressed and rejected this allegation.
10 The ALJ specifically noted that he would consider "the type,
11 dosage, effectiveness and side effects of any medication the
12 claimant takes or has taken to alleviate pain or other symptoms"
13 when assessing plaintiff's severity of impairment and resulting
14 credibility. Tr. 558. There is no evidence that plaintiff
15 complained of any medication side effects to any medical source.
16 Tr. 560. As noted previously, the record contains evidence of
17 alcohol and drug dependency, and secondary gain motives. Tr.
18 552-563. The court notes that plaintiff's daughter provided the
19 ALJ with a statement whereby she questioned plaintiff's overuse
20 of medication and veracity. Tr. 384-85. The ALJ previously
21 found plaintiff not credible and that the medical evidence failed
22 to support the severity of plaintiff's disabling impairments.
23 The court will not disturb that finding.

24 B. FAILURE TO COMPLY WITH REMAND ORDER

25 This court previously remanded this case with instructions

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27 ¹ The plaintiff also suggests other errors, however recognizes
28 this court's previous rejection of those arguments. The court
declines to reconsider arguments previously made by plaintiff and
rejected by this court.

1 to the ALJ to hold a second hearing to pose a hypothetical to the
2 VE that included plaintiff's limitations to 1,2, 3-step tasks and
3 to simple, routine and repetitive tasks.

4 Job descriptions in the DOT contain several components,
5 including a measurement tool called the Specific Vocational
6 Preparation (SVP) scale. The SVP is defined as the amount of
7 time a typical worker requires to learn techniques, acquire the
8 information, and develop the facility needed for average
9 performance in a specific job. The DOT classifies SVP at levels
10 1 through 9. Unskilled work has an SVP of 1 or 2. SSR 00-4p, at
11 *3. The time required to learn a job with an SVP of 2 is
12 anything beyond "short demonstration" and up to and including 1
13 month. 20 C.F.R. §§ 404.1568(a), 416.968(a). The DOT indicates
14 that each of the jobs identified by the VE here have a SVP of 2,
15 corresponding to unskilled work. WL DICOT 239.567-010 (office
16 helper) and 209.667.014 (order caller). Unskilled work is simple
17 work requiring little or no judgment and primarily deals with
18 objects rather than people. 20 C.F.R. §§ 404.1568(a),
19 416.968(a).

20 A second component to a DOT job description is the General
21 Educational Development (GED) scale. The GED measures an
22 individual's educational achievement in reasoning, math and
23 language. The DOT explains that the GED includes general
24 education, specifically, education obtained in formal schooling,
25 as well as education or knowledge obtained from experience and
26 self-study. WL DICOT Appendix C. The DOT defines the first two
27 levels of reasoning development as follows:

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1 LEVEL 1 - Apply commonsense understanding to carry out
2 simple one- or two-step instructions. Deal with
3 standardized situations with occasional or no
4 variables in or from these situations encountered on
5 the job.

6 LEVEL 2 - Apply commonsense understanding to carry out
7 detailed but uninvolved written or oral instructions.
8 Deal with problems involving a few concrete variables
9 in or from standardized situations.

10 Id.

11 Plaintiff asserts that she is unable to perform the jobs
12 identified by the VE because they require a Reasoning Level 2 on
13 the GED scale. Pl's Memo, p. 19-21. Plaintiff argues that
14 unskilled work encompasses jobs which require more complexity
15 than "simple 1-2-3 step instructions" as described in DOT.

16 The Commissioner responds that this argument "lacks merit
17 as the ALJ limited Plaintiff to unskilled work that involved no
18 more than 1,2 and 3 step tasks" in the hypothetical presented to
19 the VE. Defendant's Brief, p. 6. The VE found two jobs, officer
20 helper and order caller, that satisfied plaintiff's need for
21 unskilled jobs and, according to the VE, involved no more than
22 1,2, 3 step tasks. The defendant notes that unskilled work
23 corresponds to jobs with an SVP of 2 and that both identified
24 jobs have an SVP of 2, therefore, no conflict exists between
25 plaintiff's limitation to unskilled work and these jobs. Id.

26 At step five of the sequential evaluation process, an ALJ
27 may generally rely on the testimony of a VE. 20 C.F.R. §§
28 404.1566(e), 416.966(e). The Commissioner takes administrative
notice of job information in the DOT, but also relies on
information provided by a VE. 20 C.F.R. §§ 404.966(d),
416.966(d). When a conflict exists between the two sources, the
ALJ may rely on the VE's testimony when he or she provides a

1 reasonable explanation of the conflict based on the ALJ's
2 experience. Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir.
3 1995) (ALJ may rely on VE testimony that contradicts the DOT when
4 the record contains persuasive evidence to support the
5 deviation).

6 Here, the parties concede that the Ninth Circuit Court of
7 Appeals has not yet addressed the issue of whether a plaintiff
8 limited to simple, repetitive work and 1,2, 3-step tasks can
9 perform jobs with a GED Reasoning Level 2. Nevertheless, I find
10 no persuasive evidence to support the argument that in order to
11 be defined as "unskilled work," a job must have a GED Reasoning
12 Level of 1. Here, plaintiff is a high school graduate with some
13 college. The ALJ found that she met the educational/reasoning
14 level requirement (GED 2) to perform unskilled work due to her
15 educational background. Although the DOT definition states that
16 GED 2 level jobs require the ability to carry out "detailed
17 instructions," it also specifically states that the instructions
18 are "uninvolved" involving a "few concrete variables" from
19 "standardized situations." Moreover, the Commissioner defines
20 unskilled work as simple work with an SVP or 1 or 2. 20 C.F.R.
21 §§ 404.1568(a), 416.968(a). The Commissioner also presumes that
22 plaintiffs with a marginal education (6th grade or less) or a
23 limited education (7th - 11th grades) have the reasoning ability to
24 perform unskilled work. 20 C.F.R. §§ 404.1564(b)(2)-(3),
25 416.964(b)(2)-(3).

26 Finally, three circuits have examined this question and
27 held that a GED Reasoning Level 2 is consistent with a
28 restriction to simple, routine, repetitive work. See Hackett v.

1 Barnhart, 395 F.3d 1168, 1176 (10th Cir. 2005) (GED "level two
2 reasoning appears more consistent with plaintiff's RFC" to
3 "simple and routine work tasks"); Renfrow v. Astrue, 496 F.3d
4 918, 921 (8th Cir. 2007) (unskilled work consistent with GED
5 Reasoning Level 3); and Money v. Barnhart, No. 03-2553, 2004 WL
6 352291, at *3 (3rd Cir. Feb. 24, 2004) ("working at [GED] reasoning
7 level 2 would not contradict the mandate that her work be simple,
8 routine and repetitive"). See also, Meissl v. Barnhart, 403
9 F.Supp.2d 981, 983-85 (C.D. Cal. 2005).

10 **CONCLUSION**

11 The Commissioner's decision is based on substantial
12 evidence, and is therefore, affirmed. This case is dismissed.
13 IT IS SO ORDERED.

14 Dated this 21 day of July 2008.

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18 Ann Aiken
19 United States District Judge
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